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No. _____

In The
Supreme Court of the United States
October Term, 1992

SILVER CLOUD, INC. d/b/a COLUMBIANA PLASTICS; and STEPHEN J. MOTOSKO, II,

Petitioners,

v.

NATIONAL KITCHEN PRODUCTS; EDWARD J. MORRIS AND QUIKUT, A DIVISION OF SCOTT & FETZER COMPANY,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented has two parts:

1. Whether a motion filed pursuant to Rule 59(e), F.R. Civ. P., remains pending until the district court makes and dockets an oral or written decision upon the motion; and

2. Whether a motion filed pursuant to Rule 59(e), F.R. Civ. P., which is technically interlocutory because it is directed at fewer than all of the claims in the litigation is, nevertheless, a Rule 59(e) motion;

so that a notice of appeal from the merits judgment, filed before any decision, whether oral or written, upon the Rule 59(e) motion has been made, is premature.

STATEMENT OF PARTIES

All parties in the court below are named in the caption. Silver Cloud, Inc., d/b/a Columbiana Plastics, is a Delaware corporation owned by the other petitioner herein, Stephen J. Motosko, II. Petitioners were plaintiffs in the district court and were appellants below.

Respondent National Kitchen Products is a corporation wholly-owned by Respondent Edward J. Morris. Respondent Quikut is a Division of Scott & Fetzer Company, a Delaware corporation. Respondents were defendants in the district court and were appellees below.[1]

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[1] Respondent Quikut filed a separate appeal (No. 92-4373), which is still pending in the court below.

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PETITION FOR WRIT OF CERTIORARI

Silver Cloud, Inc., d/b/a/ Columbiana Plastics ("Silver Cloud"), and Stephen J. Motosko, II ("Motosko") respectfully petition this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit, dismissing on timeliness grounds the Petitioners' appeal from a directed verdict (and final judgment) dismissing their anti-trust claims against the respondents National Kitchen Products ("NKP"), Edward J. Morris ("Morris"), and Quikut, Division of Scott & Fetzer Company ("Quikut").

Petitioners argued below that their appeal could not be dismissed on timeliness grounds, since there was still pending in the district court a "motion for reconsideration," which constituted a motion to alter or amend a judgment pursuant to Rule 59(e), F.R. Civ. P., and that their appeal could be dismissed only as being prematurely filed.

The Court of Appeals held that a "motion for reconsideration" of a directed verdict of dismissal is not a motion pursuant to Rule 59(e), F.R. Civ. P., if it is directed at fewer than all of a plaintiffs' claims and, in any event, the motion in the instant case was "effectively" overruled when the district court submitted Petitioners' remaining claim to the jury.

OPINIONS AND ORDERS BELOW

The district court never entered a decision, either oral or written, upon the "Plaintiffs' Motion for Reconsideration."

The district court entered final judgment on October 14, 1992 (Appendix B hereto).

The Court of Appeals entered its decision dismissing the Petitioners' notice of appeal on March 18, 1993 (Appendix A hereto).

JURISDICTION

1. The district court's jurisdiction was based upon Section 4(A) of the Clayton Act, 15 U.S.C., Section 15(A), and upon 28 U.S.C., Sections 1331 and 1337.

2. The Court of Appeals issued its decision on March 18, 1993, dismissing Petitioners' appeal. This Petition is being filed within ninety days of that date. This Court has jurisdiction over this case pursuant to 28 U.S.C., Section 1254(1).

STATUTES AND RULES INVOLVED

This case principally involves the following statutes and rules:

1. Rule 59, Fed. R. Civ. P., provides:

> "(a) **Grounds.** A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment. . . .

"(e) **Motion to Alter or Amend a Judgment.** A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

2. Rule 4, Fed. R. App. P., provides:

"(a)(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing."

STATEMENT OF THE CASE

This case originated in the United States District Court for the Northern District of Ohio, Eastern Division.

Petitioners commenced this litigation by filing their Complaint against the Respondents on September 8, 1989. Briefly stated, the Petitioners' claims were as follows:

Motosko owned Silver Cloud. Motosko invented and patented a manually-operated vegetable slicer, which incorporated as its cutting edge a kitchen knife manufactured by Quikut. The vegetable slicer was specially shaped to accommodate only the Quikut knife.

In 1984, Silver Cloud entered into a contract with Quikut, under the terms of which Quikut became the exclusive distributor of Motosko's vegetable slicer. Quikut agreed to sell the vegetable slicer in the "demonstration market," where Quikut was already selling its knives. The "demonstration market" consists of several hundred professional "pitchmen," who perform demonstrations of household products, mainly at home shows and fairs. Through its knife business, Quikut had developed a list of the identities of these pitchmen and had established relationships with them.

Morris, through his company NKP, was the nation's only existing supplier of manually-operated vegetable slicers to the demonstration market.[2] He was also one of Quikut's largest knife customers. The Complaint alleged that Morris induced Quikut to breach its agreement with Silver Cloud and to refrain from entering the vegetable slicer market, in return for which Morris agreed not to compete against Quikut by entering the market as a distributor of knives.

Petitioners' Complaint contained eight separate Counts, most of which asserted violations of the Federal

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[2] The vegetable slicers that Morris distributed were not patented and did not incorporate the Quikut knife.

anti-trust laws. Petitioners also asserted a breach of contract claim against Quikut.

The case was tried to a jury in September, 1992. During the trial, Petitioners dismissed a number of the Counts in their Complaint. They sought to submit to the jury only a portion of Count I (which alleged a conspiracy between the Respondents to monopolize the market for manually-operated vegetable slicers), Count II (which alleged a combination between the Respondents in restraint of trade), and Count III (which alleged a breach of contract by Quikut).

On September 30, 1992, following the presentation of all the evidence at the jury trial, the trial judge, the Honorable Sam H. Bell, orally granted the motion of all Respondents to dismiss Petitioners' antitrust claims. (A transcript of his oral decision is Appendix D hereto)

The following day, Petitioners' counsel advised the trial judge that he wished to file a motion asking the judge to reconsider his decision granting the motion to dismiss. The trial judge stated that he would give the motion serious consideration, but in the meantime, he wanted to proceed to submit the Petitioners' remaining claim, the contract claim against Quikut, to the jury. (A transcript of this exchange is Appendix E hereto)

On October 5, 1992, Petitioners filed a lengthy "Motion for Reconsideration of the Directed Verdict Dismissing Plaintiffs' Antitrust Claims." (Docket entry 157) That motion (minus the exhibits which were attached to it) is Appendix C hereto. Petitioners moved the district court " . . . for reconsideration of its decision sustaining Defendants' motions for directed verdicts with respect to

the antitrust claims presented herein." (Appendix C, p. A6) They asked the court " . . . to vacate its order of a directed verdict and allow the jury to enter a verdict on these causes of action." (Appendix C, p. A7) Petitioners restated this request at the conclusion of their Memorandum:

> "Plaintiffs respectfully submit that the Court should, upon reconsideration, vacate its directed verdict dismissing Plaintiffs' antitrust claims." (Appendix C, p. A24)

As the docket indicates, Judge Bell has never made or entered a decision on the Plaintiffs' Motion for Reconsideration.

On October 6, Judge Bell submitted Petitioners' contract claim to the jury. The next day, the jury returned a verdict on the contract claim against Quikut in the amount of $70,000.00. (Docket entry 162)

On October 14, 1992, Judge Bell entered a final judgment incorporating the jury verdict and dismissing all of Petitioners' remaining claims with prejudice, per his oral decision of September 30 (Appendix B). He still did not rule upon Plaintiffs' Motion for Reconsideration, filed October 5th.

Petitioners sought to appeal from the judgment of October 14, 1992, insofar as it dismissed their antitrust claims against the Respondents. Quikut sought to appeal from the jury verdict rendered against it. It also moved for judgment as a matter of law and for a new trial on the contract claim.

On November 16, 1992, the district court entered an order denying Quikut's motion. On December 2, 1992, Quikut filed a notice of appeal (docketed as Case No. 92-4306). On December 7, 1992, Petitioners filed a notice of appeal (docketed as Case No. 92-4320). Petitioners' appeal is the within proceeding.[3]

On December 9, 1992, the district court entered an order denying a motion for prejudgment interest which had been filed on October 13 by the Petitioners. On December 16, 1992, Quikut filed a second notice of appeal (docketed as Case No. 92-4373). Petitioners did not file any further notices of appeal.

On February 17, 1993, Respondents moved the Court of Appeals to dismiss the Petitioners' appeal on the ground that the motion for prejudgment interest was a Rule 59(e) motion and that Petitioners' notice of appeal, which was filed before a decision on that motion, was a nullity. According to the Respondents, since the Petitioners failed to file a new notice of appeal following the decision on the motion for prejudgment interest, their appeal should be dismissed.

Petitioners responded that *both* of the appeals, theirs and Quikut's, should be dismissed, *not* because they were untimely, but because they were still *premature*. Petitioners pointed out that their "Plaintiffs' Motion for

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[3] Petitioners had filed a previous notice of appeal on November 12, 1992, which was docketed as Case No. 92-4230. This notice of appeal was subsequently dismissed as premature, since it was filed prior to November 16, 1992, when the district court rendered its decision on Quikut's motion. The Court of Appeals dismissed that notice of appeal on December 8, 1992.

Reconsideration" had never been ruled upon by the district court, and since that motion was also a Rule 59 motion, *all* existing notices of appeal were premature.

On March 18, 1993, the Court of Appeals granted Respondents' motions to dismiss Petitioners' appeal. The court held that the Plaintiffs' Motion for Reconsideration was not a Rule 59(e) motion, since it did not relate to all of the Petitioners' claims; and the court held that Judge Bell had "effectively" ruled upon the Plaintiffs' Motion for Reconsideration when he submitted Petitioners' remaining claims to the jury. (Appendix A, p. A3)

Petitioners seek a writ of certiorari from this Court to set aside the decision of the Court of Appeals.

REASONS WHY REVIEW SHOULD BE GRANTED

Rule 4(a)(1), F.R. App. P., provides that a notice of appeal must be filed within thirty days of the entry of the judgment or order from which the appeal is taken. Rule 4(a)(4), however, provides that any notice of appeal filed while a Rule 59 motion is pending is premature and, therefore, a nullity. A new notice of appeal must be filed following a decision upon all pending Rule 59 motions. That includes motions for a new trial and motions to alter or amend a judgment.

This appeal presents two important questions, one of them involving a split of authority among the Circuit Courts of Appeal.

I. THERE IS A CONFLICT AMONG THE CIRCUITS ON THE IMPORTANT QUESTION OF WHETHER A MOTION TO ALTER OR AMEND A JUDGMENT, EVEN AN INTERLOCUTORY ONE, WHICH IS PENDING ON THE DATE FINAL JUDGMENT IS ENTERED, IS DEEMED TO BE A RULE 59(e) MOTION

There is no provision in the Federal Rules of Civil Procedure for a "motion to reconsider." *McDowell v. Dynamics Corp. of America*, 931 F.2d 380 (6 Cir. 1991); *Smith v. Hudson*, 600 F.2d 60 (6 Cir. 1979). It has been uniformly held, however, that a "motion to reconsider" filed within ten days following the entry of judgment is treated as a motion to alter or amend the judgment under Rule 59(e). *See, e.g., McDowell, supra*, at 382; *Smith, supra*, at 62.[4] Indeed, *any* motion filed during the ten-day period, no matter how the motion is denominated, which asks a court to vacate, reconsider, or reverse its prior holding, is treated as a motion under Rule 59(e) to alter or amend the judgment. *Lavespere v. Niagara Machine & Tool Works, Inc.*, 910 F.2d 167 (5 Cir. 1990); *Smith v. Hudson, supra*; *U.S. v. Gargano*, 826 F.2d 610 (7 Cir. 1987); *Charles v. Daley*, 799 F.2d 343 (7 Cir. 1986) (" . . . all substantive motions served within ten days of the entry of a judgment will be treated as based on Rule 59." *Id.*, at 347.)

In the instant case, the Plaintiffs' Motion for Reconsideration was filed *prior* to the entry of judgment. As the

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[4] A "motion to reconsider" filed *more* than 10 days following the entry of a judgment is treated as a Rule 60(b) motion. *Lavespere v. Niagara Machine & Tool Works, Inc.*, 910 F.2d 167 (5 Cir. 1990).

Court of Appeals for the Sixth Circuit recently held, however, that makes no difference:

> "The Defendants argue that the Plaintiffs motion [to reconsider] could not properly have been treated under Rule 59(e), however, because it was made prior to the entry of judgment, and thus could not have been a motion 'to alter or amend the judgment.' This argument in our opinion lacks merit. . . . It is not unusual . . . for a putative Rule 59(e) motion to predate the formal entry of judgment. This is due to the fact that the Fed. R. Civ. P. 58 requires that judgments be entered in a document that is separate from the Court's memorandum opinion. . . . Thus, in this case, the Plaintiffs' motion cannot be read out of Rule 59(e) solely because it was prematurely filed." *Smith v. Hudson, supra* at 62.

The Plaintiffs' Motion for Reconsideration sought the vacation, reconsideration, and reversal of the district court's decision granting a directed verdict; it was filed within ten days of entry of the judgment; it, therefore, constituted a motion to alter or amend a judgment under Rule 59(e).

In the instant case, however, the Court of Appeals held that the Plaintiff's Motion for Reconsideration was not a motion to alter or amend a judgment under Rule 59(e), because it was "interlocutory," *i.e.*, it was directed at fewer than all of the claims in the litigation. According to the Court of Appeals, a motion which is interlocutory cannot be considered a motion pursuant to Rule 59(e), and, therefore, cannot toll the period for filing a notice of appeal.

That is not the rule in the Tenth Circuit. In the Tenth Circuit, a motion for reconsideration, even of an interlocutory order, which is *pending* on the date final judgment is entered, is deemed to be a Rule 59 motion, and the time for filing a notice of appeal runs from the date that motion is decided. *See, Hilst v. Bowen*, 874 F.2d 725 (10 Cir., 1989); *Director of Revenue v. United States*, 392 F.2d 307 (10 Cir., 1968).[5]

This Court should hear and decide the within appeal in order to resolve this conflict between the circuits.

II. THE COURT SHOULD GRANT THE PETITION AND SUMMARILY REVERSE THE COURT OF APPEALS' DECISION IN THIS CASE, BECAUSE THE RECOGNITION OF "IMPLICIT" DECISIONS ON RULE 59(e) MOTIONS RENDERS THE OPERATION OF RULE 4, F.R. APP. P., SUBJECT TO UNCERTAINTY AND MAKES IT IMPOSSIBLE FOR PARTIES TO KNOW WHEN TO FILE A NOTICE OF APPEAL

The second question presented by the within appeal is whether a motion pursuant to Rule 59(e), F.R. Civ. P., can be ruled upon by a trial court "implicitly." In the instant case, the district court entered final judgment while a Rule 59(e) motion was pending, without docketing a decision upon the motion, without rendering a

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[5] In the Tenth Circuit, a motion for reconsideration is not considered a motion to alter or amend a judgment under Rule 59(e) *only* where it is directed to a decision which does not completely dispose of *any* of the plaintiff's claims, and which, therefore, *cannot become* a final judgment. *See, Wagoner v. Wagoner*, 938 F.2d 1120 (10 Cir. 1991).

written decision upon the motion, and without even deciding the motion orally. The Court of Appeals, however, held that the trial court had "effectively" overruled the motion when the trial court completed the trial and entered final judgment. Thus, the within appeal presents the issue of whether the district courts must make written decisions on Rule 59 motions and must docket those decisions, or whether a district court may later be found to have overruled the motion, simply because it took action inconsistent with the relief requested in the motion.[6]

If this Court accepts the proposition that a Rule 59 motion may be "implicitly" overruled, then parties who seek to appeal from a final judgment will be forced to guess when to file their notice of appeal, because a notice of appeal must be filed within thirty days following the rendition of a decision on all Rule 59 motions. *See*, Rule 4(a)(1), Federal Rules of Appellate Procedure. This Court has consistently attempted to avoid that result by seeking "bright line" standards defining the events which trigger the requirement of filing a notice of appeal. *See, Osterneck*

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[6] According to the Court of Appeals, the fact that, subsequent to the filing of Plaintiffs' Motion for Reconsideration, the district court proceeded to implement its previous oral ruling dismissing the Petitioners' anti-trust claims demonstrates that the district court considered and overruled the Plaintiffs' Motion for Reconsideration.

Actually, this demonstrates no such thing. This sequence of events is equally consistent with the conclusion that the district court *never* considered the Plaintiffs' Motion for Reconsideration and simply ignored it.

v. Ernst & Whinney, 489 U.S. 169 at 176-177, footnote 3 (1989).

Under the rule adopted by the Court of Appeals in the instant case, Rule 59 motions may be ruled upon not only by entering a decision upon the docket, but also by taking action inconsistent with the relief requested in the motion. Thus, a court "effectively overrules" a Rule 59 motion by failing to alter or amend its judgment or by simply proceeding to enter the judgment which the Rule 59 motion seeks to change. The effect of the rule manufactured by the Court of Appeals in the instant case is to repeal Rule 4(a)(4), F.R. App. P., which precludes the filing of a notice of appeal until a ruling is actually made on all Rule 59 motions, and to repeal Rule 79, F.R. Civ. P., which requires all judgments and orders to be in writing and to be docketed.

CONCLUSION

For the foregoing reasons, the Petition should be granted and the decision of the Sixth Circuit summarily reversed.

Respectfully submitted,

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